GARRETT *et al. v.* RUTHERFORD *et al.*

Sept. 10, 1908.

[62 S. E. 389.]

1. Evidence—Admissions—Probative Force of Evidence of Verbal Admissions.—Evidence of verbal admissions, consisting as it does of the mere repetition of oral statements, ought to be received with great caution, especially when made to and proved by persons having no interest in the subject of the conversation.

[Ed. Note.—For cases in point, see Cent Dig., vol. 20, Evidence, § 1029.]

2. Trusts—Express Trusts Affecting Real Estate, Not in Writing.—The question is an open one in Virginia whether an express trust affecting real estate is valid unless in writing.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 47, Trusts, §§ 15-24.]

3. Same—Creation—Sufficiency of Evidence.—Testimony of witnesses as to conversations they had with a husband and wife more than 30 years before, in which the couple stated that the wife had money with which to buy a farm, that they had selected a certain farm which they afterwards bought, and that it was agreed by them while in Kentucky that they should come to Virginia and buy a farm with her money and for her benefit, is insufficient, after the death of the wife and the incompetency of the husband, to impress upon the land purchased an express trust in favor of the wife's heirs at law, especially where the man and wife were married prior to the married woman's act of April 4, 1877 (Laws 1876-77, p. 333, c. 329), when, in the absence of a stipulation to the contrary, the money of the wife when received by the husband became his absolute property.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 47, Trusts, §§ 66-68.]

Appeal from Circuit Court, Lee County.

Suit by one Rutherford and others against one Garrett and others, in which defendants by cross-bill sought to impress land in controversy with an express parol trust. From a decree dismissing the cross-bill, plaintiffs therein appeal. Affirmed.

Duncan & Cridlin and *B. H. Sewell,* for appellants.
M. G. Ely and *Pennington Bros.,* for appellees.

WHITTLE, J. We need only concern ourselves to consider the question raised by appellants in their cross-bill, in which, as children and heirs at law of Susan C. Rutherford, deceased, they seek to impress the land in controversy, known as the "Baylor Farm," with an express parol trust for their benefit.

They rest their claim upon the allegations that in 1871 their parents were married in the state of Kentucky, and shortly thereafter removed to Lee county, Va.; that in 1872 their father, George C. Rutherford, purchased the Baylor farm with money derived from his wife, and that, in pursuance of a distinct and positive agreement between them, it was to be her property and the legal title taken in her name; that they occupied the farm jointly as a home, and in 1887 the wife died in the belief that it had been conveyed to her in accordance with their previous understanding.

At the time of the filing of the cross-bill, George R. Rutherford had been convicted of a felony, and was confined in the state penitentiary; but his committee, by answer, denied the existence of the trust, or that the plaintiffs had any interest whatever in the property.

In point of fact the purchase was made by George R. Rutherford in his own name, and the deed to him was promptly admitted to record; and after the death of his first wife, he from time to time incumbered the property by deeds of trust to secure his individual indebtedness, and these deeds still remain unsatisfied.

The plaintiffs undertook to prove the agreement upon which their contention is founded by a single witness, A. E. Rutherford, who deposed on that point as follows: "I had a conversation with George R. Rutherford and his wife shortly after they came to Virginia. * * * In that conversation Mrs. Rutherford said that she had the money to buy a farm with. George was present, and had the same talk that she did. In said conversation they said they had selected the Baylor farm, and they afterwards bought. They told me it was the agreement between them before they left Kentucky to come here and buy a farm with her money and for her benefit."

Other witnesses were also examined "pro et con," giving with more or less circumstantiality their recollections of casual conversations had with the parties, or in their presence, subsequent to the purchase and conveyance, touching the ownership of the farm; and, from a decree dismissing the cross-bill, this appeal was allowed.

In Greenleaf on Evidence (14th Ed.) § 200, the author, in discussing the probative value of such evidence, says: "With respect to all verbal admissions, it may be observed that they ought to be received with great caution. The evidence, consisting as it does in the mere repetition of oral statements, is subject to much imperfection and mistake; the party himself being misinformed, or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens, also, that the witness by unintentionally altering a few of the expressions really used

gives an effect to the statement completely at variance with what the party actually did say."

The significance of these observations is accentuated in this instance by the circumstance that more than 30 years had elapsed since the alleged conversation took place, when the impairment of memory by lapse of time rendered it practically impossible for witnesses to bear in mind and repeat, with any degree of accuracy, the exact language of loose conferences in relation to a transaction in which they had no personal interest.

Of that species of testimony, Snider, J., in Vangilder *v.* Hoffman, 22 W. Va. 1, 11, 12. affirms: "The whole claim of the plaintiff rests upon the mere verbal statement of the appellant gathered by witnesses from casual conversations. Evidence consisting of the mere repetition of oral statements—and especially when made to and proved by persons having no interest in the subject of the conversation—is of the weakest and most unreliable character, and should be received with the greatest caution. And unless corroborated by other proof, or aided by surrounding circumstances, it must be held insufficient to establish any material fact"—citing Horner *v.* Speed, 2 Pat. & H. 616. See, also, Phelps *v.* Seely, 22 Grat. 573, and authorities in footnote to that case.

In Lench *v.* Lench, 10 Vesey Jr.'s R. 511, Sir William Grant, the Master of the Rolls, at page 517, commenting upon the insufficiency of the evidence to establish a parol declaration of trust on behalf of the wife, upon the theory that the property was purchased by the husband with trust funds belonging to the wife; and in pursuance of an engagement between them to that effect, observes: "Then how is the fact made out? There is no material evidence but that of the trustee, who is made a competent witness by a release. She swears to no fact or circumstance capable of being investigated or contradicted; but merely to a naked declaration supposed to be made by the husband himself, admitting that the purchase was made with the trust money. That in all cases is most unsatisfactory evidence, on account of the facility with which it may be fabricated, and the impossibility of contradicting it. Besides, the slightest mistake or failure of recollection may totally alter the effect of the declaration. There are no corroborating circumstances by any writing under his hand."

The danger of relying upon that class of evidence is further enhanced where, as in this case, the testimony of the principal actors in the occurrence is lost—that of the wife by death, and of the husband by incompetency. Common observation teaches us that the character of desultory talk attributed to these people is of common occurrence in the unrestrained intercourse between man and wife, or other members of the same family; and it would be a most unsafe doctrine to rest the title to real estate upon any

such shadowy foundation. Moreover, the fact must not be lost sight of that Rutherford and wife were married prior to the married woman's act of April 4, 1877 (Laws 1876-77, p. 333, c. 329), and at that time, in the absence of stipulation to the contrary, the money of the wife when received by the husband became his absolute property.

The question is an open one in this state whether an express trust affecting real estate is valid unless in writing. Sprinkle *v.* Hayworth, 26 Grat. 384; Borst *v.* Nalle, 28 Grat. 423; Jesser *v.* Armentrout, 100 Va. 666, 42 S. E. 681.

On that subject Mr. Minor remarks: "Whether contracts touching trusts in lands are within our statute has not been adjudged; but it would seem that little doubt can exist that they are. In England all doubt is obviated by section 7 of the statute of frauds (29 Car. II, c. 3), which requires all creations and declarations of trust to be in writing, signed by the party, or by last will; whilst section 8 excepts resulting, implied, and constructive trusts (2 Washb. R. Prop. 191-2; 2 Min. Inst. [4th Ed.] 847).

In Jesser *v.* Armentrout, *supra,* Keith, P., in delivering the opinion of the court, says: "It is not necessary, we think, to discuss the controverted question as to whether a trust in lands may be created by a parol declaration. We prefer to leave that question where it was placed by Judge Moncure in Sprinkle *v.* Hayworth, 26 Grat. 384, and by Burks, J., in Borst *v.* Nalle, 28 Grat. 423. If a trust could be created by parol, the declaration should be unequivocal and explicit, and established by clear and convincing testimony." The learned judge proceeds to show the total insufficiency of evidence such as we are considering to prove the existence of a trust, and concludes: "Granting that a trust may be created by parol, to establish such a trust upon such declarations would be productive of great mischief."

In this aspect of the case, we are of opinion that the decree of the circuit court is without error and ought to be affirmed.

Affirmed.

Note.

Again has the interesting question been presented to our court whether an express parol trust in lands is enforceable; again has the court avoided a decision of the same on the ground that the evidence was insufficient even if such a trust could be proven by parol evidence. There is much speculation amongst the members of the profession as how this question will be decided when squarely presented to the court upon sufficient evidence. Relying in the main upon Prof. Minor's statement that "there can be little doubt that contracts touching trusts in land are within our statute," the concensus of opinion is that they will be declared void. It seems to us, however, that there is great doubt. The seventh section of the English statute of frauds in not in force in Tennessee (Woodfin *v.* Marks, 104 Tenn. 512); Ohio (Russell *v.* Bruer, 64 O. St. 1, 59 N. E. 740); North

Carolina (Ownes *v.* Williams, 130 N. Car. 165); Texas (Osterman *v.* Baldwin, 6 Wall. 123, citing Miller *v.* Thatcher, 9 Texas 484, 60 Am. Dec. 172); or Delaware (Pierson *v.* Pierson, 5 Del. 11; Hall *v.* Livingston, 3 Dec. Ch. 348), and for that reason it is held that parol declarations of a trust in lands is valid.

In Connecticut (Dean *v.* Dean, 6 Conn. 285; Vail's Appeal, 37 Conn. 198; Todd *v.* Munson, 53 Conn. 579; Verzier *v.* Convard, 75 Conn. 1), parol trusts are excluded. But the cases proceed on the theory that to admit parol evidence to annex a trust to a deed would be to vary or contradict the deed by parol evidence.

In Kentucky though no enactment equivalent to the seventh section of the statute of frauds is in force, the act requiring sales of lands to be in writing, supplemented by the provision that "no estate of inheritance or freehold or for a lease of more than one year, in lands, shall be conveyed unless by deed or will," which is § 2413 of the Virginia Code, seems to have been considered by the courts as sufficient to prevent parol trusts of land. Chiles *v.* Woodson, 2 Bibb (Ky.) 71; Parker *v.* Bodley, 4 Bibb (Ky.) 103; Sherley *v.* Sherley, 97 Ky. 522. See, also, holding parol trusts invalid, Speers *v.* Sewell, 4 Bush. (Ky.) 239; Harper *v.* Harper, 5 Bush. (Ky.) 177; Rucker *v.* Abell, 8 B. Mon. (Ky.) 566, 48 Am. Dec. 406; Usher *v.* Flood, 83 Ky. 552; Com. *v.* Chesapeake, etc., R. Co., 94 Ky. 20. Compare Woolfolk *v.* Earle (Ky. 1897), 40 S. W. Rep. 247. The cases in this state cannot, perhaps, be reconciled, but in Sherley *v.* Sherley, 97 Ky. 522, many of the cases are cited, and an attempt made to reconcile them.

The seventh section is not in force in Hawaii (Kamihana *v.* Glade, 5 Hawaii 497); but whether a parol trust is valid is still an open question (Mann *v.* Campbell, 6 Hawaii 382).

In West Virginia (Titchenell *v.* Jackson, 26 W. Va. 460; Currence *v.* Ward, 43 W. Va. 367, 27 S. E. 329), the question is still an open one.

So that we have five states holding that such trusts are valid, and only two that they are invalid, which showing does not seem to justify Prof. Minor's sweeping statement that "there can be no doubt that they are within the statute."

In Hancock *v.* Talley, 1 Va. Dec. 433, it is said that the provisions of the seventh and eighth sections of the English statute of frauds never were enacted in Virginia; and the law here, in relation to declarations of trust, is, and always has been, the same that it was in England before the statute; consequently verbal declarations of trusts may be set up by parol proof in Virginia.

And Judge Lomax, in his digest of the law of real property (vol. 2, p. 145), says: "By the English statute of frauds it is expressly required that all declarations of trust (which is construed to comprehend declarations of uses also) shall be in writing. This section of that statute has not been adopted in Virginia, and the declaration of a use must be regarded as a contract for the sale of land, or conveyance of an estate of inheritance or freehold, or for a term of more than five years, before it can be brought within the provision of our statute of frauds, or our statute of conveyances." See note to Hinton *v.* Pritchard (N. C.), 10 L. R. A. 401.